

Yerger Trucking, Inc. and Yerger Landscaping & Paving, Inc. and Teamsters Local Union 429 a/w International Brotherhood of Teamsters, AFL-CIO¹

Yerger Trucking, Inc. and Teamsters Local Union 429. Cases 4-CA-19810 and 4-RC-17637

May 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On February 3, 1992, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondents filed exceptions to the judge's decision, and the General counsel filed an answering brief to the Respondents' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,² findings, and conclusions and to adopt the recommended Order.³

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² We deny the General Counsel's motion to strike the Respondent's exception which is "directed . . . generally to the entire report of the administrative law judge" We find no merit in that general exception, however. In addition, on the unopposed request of the General Counsel, we take notice of the order granting temporary injunction in this case under Sec. 10(j) of the Act issued on November 29, 1991, by Judge Edward N. Cahn of the U.S. District Court for the Eastern District of Pennsylvania, and further take notice of the General Counsel's motion filed with that court to extend the order granting temporary injunction until November 29, 1992.

³ We find meritless the Respondent's three specific exceptions to the recommended Order of the administrative law judge. First, the Respondents contend that the order of reinstatement to employment of the discriminatees is inappropriate because those individuals were offered and declined reinstatement on or about December 19, 1991 (with the exception of Randall Frazer). The Respondents have failed to present the Board with any evidence supporting its claim. The Respondents will have an opportunity to do so in the compliance portion of these proceedings, to which we accordingly leave resolution of this issue.

Secondly, the Respondents contend that absent the return of the prounion discriminatees, the remaining employee complement does not desire union representation. The Respondents assert accordingly that the imposition of a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is inappropriate. We disagree. The Board's well-established rule is that the validity of a bargaining order depends on an evaluation of the circumstances as of the time the unfair labor practices were committed and not, as suggested by the Respondents, on the basis of employee turnover subsequent to the unlawful conduct. *F & R Meat Co.*, 296 NLRB 759 (1989); *Highland Plastics*, 256 NLRB 146 (1981). In addition, the turnover cited by the Respondent was caused by the very unfair labor practices sought to be remedied: the Respondents' discharge of the entire bargaining unit and its refusal to rehire the prounion employees. "It would defy reason to permit an employer to deflect a *Gissel* bargaining order on the ground of employee turnover when that turn-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yerger Trucking, Inc. and its alter ego, Yerger Landscaping & Paving, Inc., Sink-ing Spring, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

over has resulted from the employer's unlawful discharge of all the members of the bargaining unit." *NLRB v. Balsam Village Management Co.*, 792 F.2d 29, 34 (2d Cir. 1986), cert. denied 479 U.S. 931 (1986).

Thirdly, the Respondents argue that the portion of the recommended Order directing that the discriminatees be made whole for any loss of earnings and other benefits resulting from the discrimination against them fails to take into account earnings by the discriminatees following their discharge. The judge did make provision for such earnings by citing *F. W. Woolworth Co.*, 90 NLRB 289 (1950), which articulates the formula whereby an employer's backpay liability may be reduced by the discriminatees' earnings following their unlawful discharge.

The judge found that the validity of the Respondent's July 12 reinstatement offer to Hermany, which Hermany declined, was undermined by Yerger's continuing misconduct. We note that the Respondent did not except to this finding.

Carmen P. Cialino, Esq. and Mark E. Arbesfeld, Esq., for the General Counsel.

John M. Stott, Esq. (Hustin, Boland, Connor, & Giorgi), of Reading, Pennsylvania, for the Respondents.

Thomas H. Kohn, Esq. (Sagot, Jennings, & Sigmond), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

BENJAMIN SCHLESINGER, Administrative Law Judge. Respondents Yerger Trucking, Inc. (Trucking) and Yerger Landscaping & Paving, Inc. (Landscaping; the two being sometimes referred to collectively as Respondents or the Corporations) are charged with being alter egos. The complaint¹ alleges that, when some of Trucking's employees decided to designate Teamsters Local Union 429, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) to represent them for purposes of collective bargaining, Trucking threatened to close its trucking operations; and that on July 3, 1991,² Trucking did close its facility, but Landscaping started to do the same trucking work 12 days later, only with employees who were opposed to the Union. The firing of the union supporters, as well as numerous other violations, caused the General Counsel to ask for an order requiring the Corporations to bargain with the Union, despite the Union's loss of a Board-conducted election on June 27. Respondents denied that they violated the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), in any man-

¹ The relevant docket entries are as follows: The unfair labor practice charge was filed on May 24, 1991, and amended on July 30. The complaint issued on August 20, 1991, and the hearing was held in Reading, Pennsylvania, on October 21-23, 1991.

² All dates hereinafter mentioned refer to 1991, unless otherwise stated.

ner or that they committed objectionable conduct warranting that the results of the election should be set aside.³ However, after the hearing, Respondents filed no brief, so this decision does not deal with Respondents' positions, either on the facts or the law, except as they are obvious from what their counsel stated at the hearing.

Ronald Yerger has been in the trucking business for many years. Until 1985 he operated his business as a sole proprietorship, doing business as Yerger Trucking, and his principal business was the hauling of road building materials, such as stone, sand, and blacktop. In 1985 he incorporated Trucking, and he and his wife, Donna, are the sole shareholders. In 1986 he incorporated Landscaping, and he is the sole shareholder of that corporation. He is the president of the Corporations, and Donna is vice president and secretary.⁴ There are no managers or supervisors employed by the Corporations; and Yerger is the sole person who runs both entities, while Donna helps with the bookkeeping. Yerger conceded that he is the sole person who deals with and has authority over labor relations for the Corporations. Only he hired and fired and disciplined employees.

The Corporations operated from a tract of land, wholly owned by Yerger, next to his home at Goose Lane and Chapel Hill, Sinking Spring, Pennsylvania, where he maintained the trucks utilized in his business. (Yerger's insistence that the Corporations had different addresses because they had different post office box numbers is a patent charade. Both entities existed at the same place, and Yerger's purchase of an additional post office box cannot change that fact. However, although Yerger made this claim, his execution was sloppy, because an application for employment and statements of earnings given by Trucking to its employees had printed on them what Yerger alleged was Landscaping's post office box number.) There was only one sign which would indicate who was doing business there, a sign for Landscaping. However, all the dump trucks which were parked and maintained there bore only one name on their cabs, Trucking's name. And it is obvious that both companies were doing business there, for Yerger was paid monthly rent from Trucking (\$2000) and Landscaping (\$1000), and another entity about which there was no other testimony, Yerger's Garage (\$500). In addition to having the same addresses, the Corporations had the same telephone and fax numbers.

³ The Union filed objections to the representation election and on August 16, the Regional Director for Region 4 issued a Report on Objections to Election in Case 4-RC-17637, finding that certain conduct, which is also alleged in the unfair labor practice complaint, best be resolved at a hearing. On September 26, the representation and unfair labor practice cases were consolidated.

⁴ The Corporations meet the Board's jurisdictional standards. They are both in the business of intrastate and interstate transportation. During the year preceding August 20, 1991, Trucking purchased and received goods valued in excess of \$50,000 directly from points outside Pennsylvania. In the same period Landscaping performed services valued in excess of \$50,000 for other enterprises within Pennsylvania, including Trucking and Rickel Home Centers, which enterprises are themselves directly engaged in interstate commerce. I conclude that Trucking and Landscaping are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. I also conclude that the Union, as Respondents admit, is a labor organization within the meaning of Sec. 2(5) of the Act.

With the two corporations in existence, until July 15, 1991, Yerger divided his business as follows:⁵ The Corporations had total receipts of \$1.6 or \$1.7 million in 1990. Starting in March 1990, \$600,000 or \$700,000 was received by Landscaping as a result of its exclusive contract with Compass Quarry in Paradise, Pennsylvania, to haul dirt or cover soil from the Quarry to the Chester Waste, a landfill in Honey Brook, Pennsylvania. Landscaping's only other work was a minor landscaping job, to wit, mowing lawns, for which it was paid an annual sum of \$6000. Primarily, therefore, it was a hauler of dirt and soil by truck. The trucks that it used came from two sources. First, Trucking had leased 17 triaxle dump trucks from the Hamilton Bank (Bank), with Trucking having an option to buy them (leased trucks).⁶ These were driven by Trucking's employees; and one reason for that is that, until July 15, 1991, with the exception of one 6-month period in 1989, Landscaping did not employ truckdrivers. The second source of trucks was from other trucking companies, from whom Yerger subcontracted for the use of their trucks, driven by employees of those companies (subcontracted trucks). These trucks worked solely on the Quarry contract, but each of the Corporations paid for the subcontracted trucks, in proportions that Yerger could not explain. The leased trucks worked there, too, but also worked on other jobs contracted by Yerger with some 44 other customers, which resulted in Trucking's direct receipt of \$1 million during 1990. In addition, all the work on the Quarry that was performed by Trucking's trucks was billed by Landscaping, which was paid \$3 a ton for what was hauled; and Landscaping then paid \$2.75 per ton to Trucking, which maintained the leased trucks and paid all rentals due the Bank.

Trucking employed about 17 or 18 truckdrivers and mechanics. The employees' attempt to become represented by a union began on May 20, 1991, when the wife of employee Merlin Ulrich called Arthur Kahl, the Union's business agent, to ask him to meet the next day at 5 p.m. with Trucking's employees at the parking lot outside of the Sears Auto Center at Berkshire Mall, in Wyomissing, Pennsylvania. Kahl agreed to do so and met the next day with Ulrich, Donald DeCarr, David Paine, Marci Stoltz, Scott Roboski, and Edward Nolan. The employees discussed their problems with Trucking, and Kahl told them that they could sign cards for membership in the Union. He distributed the cards; and, as the employees were signing them, Yerger and Linn Wartenluft, one of Trucking's mechanics, pulled up in Yerger's pickup truck. Yerger got out of the truck and approached the employees, and Ulrich said, "[H]ere comes Ronnie." (Obviously, he was not invited, and the employees appeared shocked to see him. Yerger's explanation as to how

⁵ This description is based primarily on Yerger's testimony, which was often confused, internally contradictory, inconsistent, and at odds with the precomplaint investigatory affidavit which he gave to the Regional Office. As a result, my decision often reflects what I find to be probable, given the choice of the many variations he offered in his testimony.

⁶ Yerger testified that his lease with the bank was an oral one. Although I recognize that there was no evidence contrary to this assertion, except for Yerger's precomplaint affidavit in which he claimed that Trucking owned the 17 trucks, I find it remarkable that any bank would permit property owned by it to be leased without a written document. I do not believe him.

he came to be there, some 7 or 8 miles away from Yerger's home and place of business, was that he had received a call from an unidentified source at the union hall, notifying him that his "guys" were having a meeting.)

Yerger was irate. He said that the employees were making a big mistake if they thought that they were bringing in the Union; and he threatened that, if the Union were successful, he would close his shop and fire them. Stoltz said that that was good: at least he would not steal from them anymore. Kahl, identifying himself, told Yerger that he had just committed an unfair labor practice. Ulrich asked Yerger who his "fink" was, but Yerger did not reply. He did, however, repeat his threat, and Kahl told him that he had committed another unfair labor practice. Yerger and his mechanic left. Most of the employees signed cards for the Union that day. By May 22 the Union had cards from 11 of Trucking's 17 employees. It made a demand for recognition on Trucking the next day, May 23, and filed a petition for a representation election with the Regional Office, supported by the 11 cards, the following day. On May 31, Yerger's attorney (not counsel in this proceeding) rejected the Union's demand for recognition.

The testimony of Kahl and the employees about the meeting was not entirely consistent, but there was a basic agreement about the tenor of Yerger's threat. Yerger admitted that he was mad that his employees were seeking help from the Union and not coming directly to him. He was so mad that he could not remember what he said. Nor could Wartzenluft, who was not mad, and had no reason to be mad; yet he could not recall what went on, either. Indeed, Wartzenluft could recall little of the reasons they went to the Mall, why Yerger invited him, how it came about that Yerger learned of the meeting, or anything else. His recollections had to be extracted with great difficulty on cross-examination, and they were most unsatisfactory and lacking in candor. For Wartzenluft to recall the color of Kahl's jacket and to testify later about the individual mechanical condition of three trucks, out of all the repair jobs that he performed for years, day after day, and not remember what Yerger said when he exited the truck and interrupted the Union meeting, the first of the alleged unfair labor practices in this proceeding, strikes me as incredible. It evidences not simply a lack of recall, but a purposeful attempt to conceal facts which are of the essence in this proceeding.

Accordingly, I do not credit his and Yerger's denials that they could not remember certain facts and find them generally untrustworthy, trying more to protect Yerger's legal position than attempting to state clearly what they observed and heard. In addition, I discredit not only this first denial made by Yerger but also all the rest of his denials of illegal conduct because it is most probable that he did violate the Act. The simple fact is that he followed this threat with additional ones and, finally, he took action. He closed Trucking and shifted its work to Landscaping. He saw many of the employees filling out cards on May 21, and he conceded that he knew who favored the Union and who did not. Thus, he hired in Landscaping only those whom he knew or had reasonable assurance to believe were opposed to the Union, and he ridded himself of those who were union adherents. That was no mere coincidence. It was a part of a carefully calculated plan, conceived in anger and desire for retribution against those who had betrayed him. Thus, Yerger's denials

are unworthy of belief, and so is his remaining testimony, which was filled with misstatements of fact and inconsistencies and flights of fancy.

Driver Charles Riegel Jr. did not arrive at the union meeting on time, but Yerger saw him on the way there as Yerger was returning to his facility from the meeting. Yerger called Riegel that night and asked whether he was late arriving at the meeting. Riegel answered that he was. Yerger then asked whether Riegel had signed a union card, and Riegel said that he had. Yerger's conduct violated Section 8(a)(1) of the Act. Both questions had the necessary consequence of indicating that Yerger knew that Riegel was going to the union meeting and that one of the events that was going to happen at the meeting was the signing of union cards. The second question constituted illegal interrogation. The Board instructed in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), that an interrogation is illegal when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Evidence of the coercive nature of Yerger's interrogation is ample. Yerger was effectively Trucking's only operating officer. Riegel was not an open and active union supporter. The questioning of Riegel "had no legitimate purpose and the questions . . . were designed to determine [the employee's] involvement in protected activities." *Hunter Douglas, Inc.*, 277 NLRB 1179, 1181 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). Yerger not only tried to find out whether Riegel and the other employees were involved in the Union's organization effort but also appeared to have intended to use that information to defeat the Union by conduct which, I find below, violated the Act. Thus, the interrogation was not an isolated event, but must be considered in the context of Yerger's scheme to find out definitely which employees were involved and what they were doing and to crush those activities quickly. *Great Dane Trailers*, 293 NLRB 384 (1989). I conclude that the interrogation violated Section 8(a)(1) of the Act.⁷ *Timsco Inc. v. NLRB*, 819 F.2d 1173 (D.C. Cir. 1987).

Yerger remained, by his own admission, "upset" and "pretty hot" for several days. The testimony of the General Counsel's witnesses, sometimes admitted and sometimes not rebutted by Yerger, evidenced his continuing bad temper. When he saw Riegel the next day, he said that he would tell Riegel what he had told the other drivers: If they went with the Union, "I will shut the fucking doors or sell the business." (This corroborates my finding that Yerger threatened the drivers at the Union's meeting.) Yerger repeated to Ulrich that he had told the employees that, if they tried to unionize, he was going to close the doors; told Ulrich that he was the one who had made the phone call "that got things started" and that he had heard Ulrich and other employees talking about the Union that morning; and directed him not to pass out any more union cards on "company property." Yerger also told DeCarr that he had heard him and others in the breakroom threatening drivers to sign union cards, accused DeCarr of being one of the leaders of the union movement, and said that the Union "wouldn't even

⁷ Truckdriver Randall Frazer also came late to the union meeting, but Yerger did not know that. However, when Frazer reported for his assignment the next day, he volunteered to Yerger that he had signed a union card.

get through the door” to talk to him. Yerger told him that the employees “were basically putting [their] dicks up [their] ass and doing [themselves] out of a job.”⁸ He also told DeCarr to remove the CB radio in his tractor because he had heard “us” threaten other drivers over the CB radio. (Two days later, Riegel testified, Yerger said that someone had made threats on the CB about throwing nails and cutting air lines. Riegel denied that he was the employee who made the threats. Most of the drivers removed their radios, both those which were owned by Trucking and those which were their personal property, by about June 1. However, Fox and Jay Seitzinger, two of the employees who opposed the Union, were permitted to reinstall their CB radios early the following week.) Yerger then asked DeCarr how he felt about the situation, and DeCarr answered that, whatever the other employees decided to do, he was with them 100 percent.

Later that day Yerger approached Nolan and said that he could not believe that he had seen Nolan at the union meeting after all the things that Yerger had done for him.⁹ Nolan replied that he appreciated what Yerger had done, but a man could only take so much, and Yerger was unfairly lowering the amounts that the drivers could earn. Yerger told him that he “had a dick up [his] ass and was fucking [himself] out of a job.” That afternoon, Nolan had a hearing to determine whether he would retain his driver’s license, because he had received a substantial number of points for various violations. After that, he called Trucking to get his assignment for the next day and was told by Donna that he was staying home. However, later, Yerger called and asked what his status was, and Nolan said that he had kept his license. Yerger told him to come to work the next day.

Yerger’s statements to Ulrich and DeCarr that he had overheard their union activities in the breakroom and to DeCarr that he was one of the Union’s leaders created unlawful impressions that he was spying on their union activities. I do not find, however, the same violation regarding Yerger’s statement about Nolan’s presence at the meeting the day before. That statement did not indicate any impression of surveillance, because Yerger was there and Nolan saw him. Although the complaint might have alleged that Yerger surveilled the union meeting at the Berkshire Mall, it did not; and I will dismiss this allegation. His threats to close the doors, sell the facility, or take such other implied action as would cause the employees to lose their jobs resulted from their attempts to seek help from the Union and violated Section 8(a)(1) of the Act. His questioning of DeCarr was intended to elicit DeCarr’s feeling about the Union and constituted illegal interrogation. His telling Nolan that, in essence, he was upset and hurt that Nolan had gone to the union meeting tends to discourage an employee from supporting a labor organization and violates Section 8(a)(1) of the Act. *Downtown Toyota*, 276 NLRB 999, 1019 (1985). Yerger’s direction to Ulrich not to pass out union cards on company property prohibited an employee from passing out cards even during nonworking time, in clear violation of Board law. *Baddour, Inc.*, 281 NLRB 546, 547 (1986), *enfd.*

⁸I have repeated this ugly expression throughout this decision because other employees also testified that Yerger said it, and Yerger admitted that the expression was one that he used, albeit not in the context that the employees testified.

⁹Nolan had been involved in an accident resulting in a fatality, and Yerger had been helpful and supportive.

mem. 848 F.2d 193 (6th Cir. 1988), cert. denied 488 U.S. 944 (1988).

The General Counsel asserts that Yerger also threatened to remove DeCarr’s CB radio, in violation of the Act, because that was a threat to change working conditions. DeCarr testified only that Yerger directed him to remove the CB radios, a direction that was followed by all the employees. That is not a threat, but a direction that working conditions were changed, in violation of the Act, assuming that the change was caused by the employees’ union activities and not some legitimate business need. That it was an 8(a)(1) violation was supported by Ulrich, who testified that Yerger told him the following day that he had heard Ulrich talking on his CB about “union business”—asking Roboski and Stoltz whether they would be interested in becoming union stewards if the Union successfully organized Trucking’s employees—and that Yerger directed him and all the other employees to remove the CB radios from their trucks. The linkage of Yerger’s direction to his having heard employees discuss union activities is sufficient to sustain the General Counsel’s burden of proving a *prima facie* case under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), which provides that Yerger may then prove by a preponderance of the evidence that he would have taken the same action, regardless of whether he was also illegally motivated by the employees’ union or otherwise protected activities.

Respondents’ proof came in part from employee Warren Ressler, who refused to sign a union card and later overheard on the CB radio other employees making threats to harm him if he did not vote for the Union. He complained to Yerger, mentioning the threats and his thought that talking about the Union over the CB radio was illegal. Yerger testified that he ordered the removal of the radios because of the threats. That is consistent with what he told Riegel but contrary to what he told Ulrich; and Ulrich’s testimony is consistent with Yerger’s desire to cut off all means of communication about the Union, as evidenced by Yerger’s order that cards were not to be solicited at the premises of his companies, his advice to employees that he was aware of all their conversations, and his later direction to Ulrich not to call his fellow drivers at their homes. Furthermore, Respondents’ answer to the complaint in this proceeding contradicted their position at the hearing. Respondents denied the allegation that Yerger had directed that the radios be removed and further: “Any CB radios that were removed were done so for repair purposes.” If the radios were removed only for repairs, they could not have been removed because Yerger heard threats. On balance, I find it more probable that the defense proposed by Yerger at the hearing was pretextual. I find that Trucking did not meet its burden of proof, but merely wanted to take away from the employees their privilege of using their CB radios—to punish them for and stop them from engaging in union activities. I conclude that there was a violation.

On May 23 Yerger told Riegel that, if the employees went with the Union, “we were all screwing ourselves, walking around with our dicks up our ass, fucking ourselves out of a job.” Yerger told Ulrich that the employees (I infer those who favored the Union) were in for a “bloody battle.” Yerger’s threat to Riegel, just one of many, involved loss of his job because of the employees’ union activities, in viola-

tion of Section 8(a)(1) of the Act. His threat to Ulrich of a "bloody battle" implied some threat of unspecified reprisals for the employees' protected activities, also in violation of the Act. His comment that he had heard Ulrich talking on his CB radio about "union business" clearly implied that Yerger was listening to Ulrich's private conversations about the Union, and Yerger never explained why it was necessary for him to be spying on his employees' conversations on the CB radio. I conclude that he engaged in illegal surveillance.

On May 24, Yerger told Riegel, as found above, that threats had been made on the CB radio. Yerger then threatened Riegel that, if the employees ever tried to picket, they had better know which part of the property was Trucking's and which was Landscaping's because, if he caught anyone "messing" with his vehicles or equipment, Yerger would shoot at them. He would not kill them, but he would maim them so that they would not be able to work "or collect." I understood this threat was directed at the employees' threats of illegal activities, and that Yerger was merely saying that, if the employees engaged in tampering with and destroying his property, he would take matters into his own hands. Although Yerger may not have been wise to make such a threat, he was not attempting to discourage the employees from engaging in legal and protected activities but was threatening them only if they should engage in unprotected vandalism and sabotage. I, therefore, find no violation of the Act. I will also recommend the dismissal of the allegation that Yerger illegally accused Riegel of making threats over the CB radio in order to discourage his union activities. Yerger did not accuse Riegel of making the threats, and his statement was not in the form of a question, looking for Riegel's response. Rather, the statement was merely prefatory to his threat that he would take severe, if not criminal, action to counter any illegal activities by his employees.

On May 31 Yerger told Ulrich that he knew that there was going to be a union meeting the next day at 2 p.m., and there was. This comment violates the Act, because it would tend to give Ulrich the impression that the employees' union activities were being surveilled. On June 1 Yerger advised DeCarr that work was probably going to be slow for the next 3 weeks and that the employees would not be working on Monday, June 3. On that day, the first business day after the union meeting, for the very first time other than days of snow, ice, and sleet, some of the regular drivers (Ulrich and those with less seniority, such as DeCarr) were told that there was no work. They spent their time off by going to the Quarry, where they saw and videotaped about five or six of Trucking's leased trucks and numerous subcontracted trucks which were doing the work that Trucking's employees normally would have done, but for their day's layoff. Ulrich called Yerger to ask why they had been laid off that day, and Yerger replied that there was no work. Riegel testified that it was unusual that there would be many subcontracted trucks in the Quarry, and some of Trucking's leased trucks in the yard. It was common for Trucking to subcontract only after all its trucks were in use.

Yerger explained that he had made advance arrangements to subcontract trucks from others and that he did not have sufficient work for his regular drivers to perform. However, I do not believe him. I find it strange that the only time that a layoff ever occurred was, according to Yerger, during a "boom" month. It cannot be coincidental that the employees

were attempting to organize and that the layoff happened the first business day after the second union meeting and while the union activities were going on. Those who were laid off were at the bottom of the seniority list; and, of the six drivers who worked, only one was a union supporter. It is likely that Yerger retained the drivers who favored the Union. By this time, in fact much earlier, he was aware of the identity of the strong union supporters. He saw them at the meeting; he interrogated and threatened them; and one, Frazer, told him that he had signed a union card. In any event, Yerger gave no believable explanation why the leases with other trucking companies could not have been cancelled. Indeed, at one point in his testimony, he stated that he used the subcontracted trucks "instead of going through all that trouble" to cancel them. I find, if there were any trouble, that was merely a convenient excuse to punish his employees for their union activities. I conclude that Yerger violated Section 8(a)(3) and (1) of the Act.

On the next day Yerger complained to Ulrich that two drivers had quit because the prounion employees were trying to get them to join the Union. Yerger told him that he did not want him calling employees at home and harassing them about the Union. Yerger said that he knew that Ulrich was the leader of the union movement and then asked him why he had lied about Nolan being fired. The original unfair labor practice alleged that Nolan had been fired, although he never was. Nolan thought he had been discharged, however, as a result of Yerger's threat at the union meeting to fire all the union supporters and then Donna's refusal the next day to assign him to a trip. Ulrich said that he had no comment. Yerger then said that he had a buyer for the business, and the new buyer did not want "any of us guys" driving for him. Ulrich replied that, if the Union got in, the buyer would have to hire the employees. Yerger countered that he would have Trucking sold before the Union got in.

Yerger committed numerous 8(a)(1) violations in this conversation. First, he told Ulrich to stop telephoning other employees to talk about the Union, a direction not to engage in protected and concerted activities, with an implied but unstated threat that Ulrich would be disciplined if he did. When Yerger restated Ulrich's role in the union drive, he again created the impression that Ulrich's union activities were under surveillance. He illegally interrogated Ulrich about the reason he had lied in telling the Board's Regional Office that Nolan had been fired. He illegally threatened to sell his business and assured Ulrich that the new owner would not hire anyone who supported the Union. I find that there was no buyer for Yerger's business and that he threatened to sell his business merely to discourage the employees from engaging in their Section 7 right to self-organize.

On June 4 Yerger told DeCarr not to drive his truck 3701. DeCarr was given an older truck (No. 3710)¹⁰ to drive, one that did not run as well, had less power, and had no air-conditioning; and he drove this truck from that day. His old truck was given to Frazer, who had more seniority; but Yerger never explained to DeCarr why his truck was

¹⁰ This designation may not be accurate. The number of all the trucks began with "37" and Ulrich testified that he also was transferred to truck 10. There is no dispute that each of the three employees were transferred to older trucks, and I find that someone made a mistake about the number of the truck to which he was assigned.

switched. On June 10 Ulrich's truck (No. 8), which he had been driving for 1-1/2 years, was allegedly taken out of service for a few days for maintenance; but Ulrich testified that he had never been advised that his truck was being repaired. Ulrich was assigned to drive truck 10, which was older, ran worse, and had no air-conditioning. (That same day Yerger told Ulrich that someone had called Yerger's home and threatened to burn his house and shop down. Yerger said that he could do the same to Ulrich, a threat made to discourage him from his union adherence in violation of Section 8(a)(1) of the Act.) When Ulrich's old truck had allegedly been repaired, he was not reassigned to it. Rather, it was given to an employee with less seniority and one who, perhaps not coincidentally, was opposed to the Union. Nolan also lost his truck (No. 5), which broke an axle and was repaired starting on May 24. Yerger told him to take truck 9 until his truck was fixed, but he never got his original truck back although the truck had been repaired and Nolan had asked Yerger for it on May 29.

The complaint alleges that the reassignment of the trucks of Ulrich, DeCarr, and Nolan constituted more onerous working assignments. Although DeCarr's truck was given to another union supporter, I still agree. Wartzluft conceded that trucks were normally returned to the drivers after the trucks were repaired, and there is nothing in this record which indicates that, prior to the employees' attempt to organize, there was any exception to this practice. It was only after the union campaign began that Respondents took away the trucks of three of the union supporters. Ulrich's reassignment from truck 8 to truck 10 may have been proper while his truck was being repaired, a fact which Ulrich denied knowing anything about.¹¹ But no credible explanation was given for the reasons that he was not reassigned his old truck when it was repaired and that an employee with less seniority was given the better truck.

Rather, Wartzluft told of an intricate plot by the employees to vandalize the trucks (particularly Ulrich, who repeatedly broke lift axle springs) and to fail to tell him about any problems with the trucks, despite the employees' obligation to file reports each day concerning the condition of their vehicles. The employees testified, however, that they continued to file their reports, with all problems noted. Respondents failed to produce those reports and failed to issue warnings to the employees for abuse of their equipment, although Trucking had issued warnings for such conduct to other employees. Further, Ulrich testified that he had never been advised that he was not driving his truck properly. I previously found that Wartzluft was not a credible witness, and the failure to back up his story merely adds to the unbelievability of his testimony. I find that the permanent reassignments were made because of the employees' support of the Union, and for no other reason. I conclude, therefore, that the reassignments violated Section 8(a)(3) and (1) of the Act.

Another result of the reassignments occurred on June 3, the date that some union supporters did not work at the Quarry, although subcontracted trucks did. When Nolan

called in for a new assignment on June 3, Yerger said that he had spoken to someone from the Board's Regional Office and had found that the unfair labor practice charge had not been taken care of. If it were not straightened out, Nolan would be unemployed, a threat that Yerger had made before. Yerger apparently then gave Nolan an assignment, and Nolan asked him which truck he would be driving. When Yerger answered that he would be driving truck 9, Nolan asked why, because that truck had traditionally been assigned to new employees, when it was not left idle, and whether this reflected a new policy. Yerger said that it did and that there would be a lot of new policies, adding that Nolan had "started this shit."

The complaint alleges that Yerger violated Section 8(a)(4) and (1) of the Act by assigning him the truck, which was the truck he drove when he had the accident that resulted in the fatality, not only because of Nolan's union activities but also because Nolan had not disposed of the unfair labor practice charge. There is enough in Yerger's remarks to sustain this allegation. That Nolan had "started this shit" might well refer to the filing of the charge about his discharge and Yerger's displeasure that it had not been withdrawn.

The next day or perhaps June 9, Yerger complained that Nolan's accident cost \$20,000 in increased insurance premiums. Nolan testified that Yerger asked whether Nolan knew where the money was going to come from and answered his own question: "Youse [sic] guys' benefits." Yerger testified that he said only: "What do you suggest? I take it from your premiums?" If I were to credit Yerger, there is the suggestion, clearly implied, that, because Yerger contributed half of the premiums for the employees' medical insurance, that he would make Nolan pay the entire premium. Nolan's accident occurred on October 4, 1990, about 8 months before, and Yerger had never mentioned that the employees would be responsible to pay him back for any insurance premium adjustment that he surely must have known would result. Yerger claimed that he had just found out that his insurance premium was going to be increased; but, when he testified about why he switched his operations from Trucking to Landscaping and told of avoiding certain costs, he never mentioned the saving of liability insurance that would result from the transfer. Furthermore, in light of my low regard for Yerger's truthfulness and because Yerger did not supply documentary proof, I doubt that he was telling Nolan the truth. In particular, I note that \$20,000 was the same amount that Yerger also claimed that he would save in unemployment and workmen's compensation insurance, discussed below, and that amount was not proved to my satisfaction either. I thus find that he threatened that he would no longer contribute to the employees' health insurance to punish them for their support of the Union and conclude that there has been a violation.

The General Counsel also contends that Yerger caused the rejection of Nolan's application for a mortgage, which Nolan had filed several weeks before the union campaign began. On May 17, 4 days before the first union meeting, Donna answered an inquiry from the United States Department of Agriculture, Farmers Home Administration (USDA), that Nolan was a truckdriver employed by Trucking and that the probability of his continued employment was "good." Donna's answers explained that the amount that he had thus far earned resulted from the fact that the first quarter was always

¹¹ The complaint alleges that Respondents illegally threatened to take away Ulrich's truck, but I conclude that a statement that Ulrich was being reassigned was not a threat to reassign him, but was the actual reassignment.

Trucking's slow time and it was likely that Nolan would continue to receive overtime and bonuses. On June 10, however, Trucking wrote to the USDA:

Since we returned your Verification of Employment form on one of our employees Edward J. Nolan Jr. information on this employee has changed to the point which we felt in your best interest to inform you about.

We recently ran an MVR report up on Mr. Nolan to find the present information on his driving record shows that Mr. Nolan only needs to receive one more minor violation to have his license suspended. Being a truck driver this could result in loss of employment.

Based in part on this letter, Nolan's application for a mortgage was denied. Nolan's last moving violation was his October 1990 accident, and that occurred long before Donna's initial reply. There is no indication that Yerger was unaware of Nolan's driving record, when Trucking made its initial recommendation. Indeed, Nolan testified that he was able, even if his license were suspended, to obtain a "bread and butter" license, issued to drivers who rely on their licenses for their livelihoods. Although Yerger denied that there was any such thing, Trucking still entered on its initial reply that Nolan's opportunity for continued employment was good. Even the above-quoted letter states only that Nolan "could" lose his job, and not that the result was predestined. These facts indicate that Yerger was well aware that Nolan had a fair chance of continuing in Yerger's employ. (Even without these facts, Yerger attempted to defend against the allegation that he had not rehired Nolan when Landscaping later began its trucking business by insisting that he was ready and willing to offer Nolan employment as a mechanic. If he thought so much of Nolan's abilities, he certainly made it appear to the USDA that Nolan did not have a reasonable chance to continue as an employee. It should go without saying, however, that I believe not one bit of Yerger's defense that he was suddenly going to hire Nolan, a truckdriver, as a mechanic, especially because he fired everyone else who voted for the Union.)

Nothing happened between May 17 and Nolan's hearing on the possibility of the suspension of his license which would indicate that Nolan's continuing employment was uncertain. If anything, the result of the hearing was favorable to Nolan, not discouraging. In other words, the probability of Nolan's continued employment was even better on June 10 than it was when Trucking initially replied. The only event that occurred between the first and second responses and that would have prompted Yerger to send the letter was Nolan's participation in union activities. In fact, the date of the Motor Vehicle report on which Yerger relied was May 23, 1991, issued just 2 days after the first union meeting. Yerger could not get his story straight about how he came into possession of the report. At the hearing, he testified that the reports on all the drivers had been sent to him by his insurer. But the above-quoted letter stated that he received the motor vehicle report ("We recently ran an MVR report up"). I find the letter accurate, because at the same time that he wrote this, no unfair labor practice complaint had issued; and Yerger would have had little incentive to fabricate. The next question is why he felt it necessary to obtain the report. Lacking any credible reason given by Yerger, I find that he was looking

for any information which might help him to defeat his employees' union activities. He used the report to change his recommendation. That resulted only from spite, because the union campaign began and because Nolan supported the Union and not Yerger, even after all that Yerger had done for Nolan. I conclude that Yerger violated the Act.

On June 27, the representation election was held, and the Union lost, 10 to 7. Two weeks before, Yerger threatened Riegel once again. He said: "[I]f you have any job applications in, or have any job offers, [you] better take them because no matter which way the vote went, [I] would either sell, or there was going to be some big changes made." I conclude that Yerger's threats, rather typical of his conduct, violated Section 8(a)(1) of the Act as threats to sell his business or, alternatively, to make changes in the employees' terms and conditions of employment resulting from the Union's petition for a representation election.

About the same time, Yerger assigned Riegel to the DEMCO (Dover Equipment and Machine Corporation) run, which was not favored by the drivers and thus was rotated among them and assigned for only 5 days. This time, Yerger announced to Riegel that: "You have got DEMCO starting Monday. You are going to go on it for a long, long, long, long, long, long time." (Actually, however, because DEMCO's needs were less, Riegel worked on the run only 3 days.) The complaint alleges that this conduct constituted the imposition of more onerous working conditions because of Riegel's union adherence. I so conclude. Also at this time, Yerger asked Keith Hotzman, a newly hired driver, whether anybody had been harassing him; if so, Hotzman should let him know. Yerger then threatened that, if the Union won the election, he would close the doors. If the Union lost, "[S]ome heads were going to roll." In addition, shortly before the election, Yerger told Frazer that there were some people who were interested in buying the company (he did not distinguish between Trucking and Landscaping) and that, if the Union were voted in, he would sell the company.

Yerger scheduled a meeting of the truckdrivers for 5 p.m. on July 3. Before the meeting he told another newly hired driver, Steve Hermany, that whatever happened at the meeting did not pertain to him. The meeting was intended to get rid of some of the "troublemakers." Hotzman, a friend of Hermany's and the person who had told Hermany of a possible opening, was apparently one of the troublemakers, because Yerger specifically told Hermany not to tell Hotzman what he had said. The employees gathered in the shop. The union supporters, Ulrich, DeCarr, Frazer, Riegel, and probably Roboski, were sitting together at a table. All the witnesses agreed that Yerger announced that as of 5 p.m., July 3, Trucking was no longer in business. According to Ulrich, Yerger added to the pronoun employees: "I told you you'd end up with your dicks up your ass." DeCarr recalled that Yerger said that the Union had forced him into retirement, and otherwise generally agreed with Ulrich's recollections. Riegel recalled Yerger's remarks differently. He looked at the employees sitting at the table and said: "You did this, I didn't, you made me do this." According to Hotzman, Yerger said: "Don't look at me. You guys are the guys that done it."

The employees who opposed the Union uniformly denied that Yerger said something separately to the pronoun employees. They testified that Yerger left the meeting imme-

diately after his announcement that he was closing Trucking and went outside, although their testimony was inconsistent about whether Yerger then stayed outside or returned to his home. The determination of credibility is somewhat difficult to gauge because Respondents' group of witnesses was so strongly opposed to the Union and to the employees who favored the Union. The General Counsel's witnesses were equally very strong union sympathizers and very opposed to the other employees. But the motive for closing Trucking is evident from what preceded Yerger's announcement on July 3, and I would have found a violation even if Yerger had not made his intent so clear in the comments that the prounion drivers attributed to him. His words merely bolstered the fact that his grand plan had been completed. The employees hurt themselves by seeking help from the Union: their actions forced Yerger to terminate them. That is, I find, what he said to them, because that is what Yerger thought and that is what he had threatened from the very first day that he found out about their union activities. Furthermore, contrary to the denials of all Respondents' witnesses who said that Yerger left the meeting immediately after his announcement and never returned, Yerger testified that he returned and told the employees to clean out their trucks before they left. The only witnesses who corroborated his testimony that he returned were the prounion employees, and they, I find, were more truthful than the other witnesses. Accordingly, I find that Yerger returned to the meeting, not for the purpose of ensuring the condition of the trucks, but for the purpose of gloating to the union adherents that it was their conduct which caused them to lose their jobs.

From July 3 until 15, Trucking did no hauling. Yerger continued to work at the Quarry, but only with 8 to 10 subcontracted trucks. He had other offers of work for his 17 trucks, but he "just pushed them off," which meant that he could have employed drivers during this self-made hiatus, but he created the hiatus in an attempt to make it appear that Trucking had discontinued its hauling operations and Landscaping later commenced business. Thus, the 17 trucks, still bearing Trucking's name on their sides, lay idle for this period. On July 15, Yerger began to use them again, but he never changed the names on the sides. So, although Trucking was allegedly no longer in the hauling business, and only Landscaping was conducting that business, the trucks with Trucking's name, still leased from the bank, continued to do the very same business as they did before.

They even had the same drivers, at least up to a point. None of the drivers who voted for the Union drove them, but the drivers who voted against the Union did. They were rehired, and the "troublemakers" were no longer employed. Furthermore, the drivers who drove for Trucking had the same seniority with Landscaping, another strange coincidence if Landscaping were truly a new firm and not merely the alter ego of the other, as it is apparent that it is. (Yerger explained that the same order of seniority did not result from his assumption of Trucking's seniority list. Rather, he denied that he had followed Trucking's seniority list, but based his new seniority list on the drivers' prior experience and driving records when they were employed by Trucking. When asked what driving records he was talking about, he answered the drivers' numbers of accidents; but on further examination, he admitted that no one had had an accident, so that accidents played no role in determining the order of seniority. When

confronted with the same order on both lists, he continued to refuse to concede that he assumed Trucking's seniority list but insisted that it was the drivers' "experience" with Trucking that caused him to prepare the list as he did. His testimony was errant nonsense.)

The only other change—and none of these changes would be seen by a member of the public, because no external change had been made—is that the method of paying Trucking for the maintenance of the trucks changed. Now, according to Yerger, Landscaping paid Trucking \$35 per hour for each truck, which was sufficient to pay the Bank on Trucking's lease, plus the cost of the maintenance of the trucks, including the cost of the wages of Trucking's two maintenance employees, Wartenluft and his brother, who were eligible voters in the election, as well as Donna and himself, and the rent, which was also paid to Yerger. The General Counsel correctly contends that Yerger could not have accurately described the payments by Landscaping for Trucking's trucks, because, based on the hours worked, the payments were much too low. What is to be gleaned from that finding, other than further support for the proposition that Yerger often misstated facts, I am not sure. I am certain, however, that the amounts of transfers were substantial: \$102,827 in May; \$121,852 in June; \$17,370 in July; and \$30,100 in early September.

The complaint alleges that Trucking and Landscaping are alter egos. In determining whether an alter ego relationship exists, the Board holds that each case must turn on its own facts, but generally an alter ego is found where two entities have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision. *Advance Electric*, 268 NLRB 1001, 1002 (1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Not all these indicia, however, must be satisfied to support such a finding. *Blake Construction Co.*, 245 NLRB 630, 634 (1979), *enfd.* in relevant part 663 F.2d 272 (D.C. Cir. 1981).

Here, there is nothing which separates the two entities, other than their names. Yerger was the sole owner of Landscaping, and he and his wife owned Trucking. Although a "finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies," the Board "focuses on whether the owners of one company retained financial control over the operations of the other." *First Class Maintenance*, 289 NLRB 484 (1988); *Adanac Coal Co.*, 293 NLRB 290 (1989). Here, Yerger had sole control over Landscaping; and he was the manager of both and was the sole supervisor of the employees. He was the sole moving force in both companies, and this supports a finding of common ownership, *Haley & Haley, Inc.*, 289 NLRB 649, 653 (1988), even if the ownership of the Corporations was not wholly identical. *Hawg-N-Action, Inc.*, 281 NLRB 56 fn. 2 (1986).

The business purpose of the two was the hauling of dirt and soil. The operation was exactly the same. The dirt was hauled in the same trucks that had been leased by Trucking and the same trucks that had been subcontracted by Yerger. The customers remained the same, at least up until several months after Landscaping took over the majority of the hauling. Yerger testified that customers frequently asked him to give estimates on jobs they were bidding on and that the work would often not be requested until a year later; and so it is likely that some of Landscaping's work was performed

for customers whose work had been bid by Trucking. The fact that there was a loss of some of Trucking's customers after July 3 may have been caused by some customers' dissatisfaction with Yerger's refusal to take any work until he reopened as Landscaping, and the fact that Landscaping at the time of the hearing had some new customers does not mean that Trucking would not have gained those same customers had it remained in business. After all, a new customer would have called the same telephone number or gone to the same location and spoken to the same person, Yerger, who would have given estimates based on the use of the same trucks and many of the same drivers and other of the same factors that he had relied on for years.

There appears in most alter ego cases an element of fraud or deceit. *Shield Pacific, Ltd.*, 245 NLRB 409, 415 (1979), enf. mem. 647 F.2d 172 (9th Cir. 1981). As stated by the United States Supreme Court in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 fn. 5 (1974), alter ego cases involve "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." Yerger claims that his switching of the business from Trucking to Landscaping was not intended to avoid the Union. That does not relieve Landscaping from liability as Trucking's alter ego, because a showing of unlawful motivation is not essential to the finding of an alter ego status. *Hiysota Fuel Co.*, 280 NLRB 763 fn. 2 (1986). Yerger's claim, however, is not without interest, because he stated in his investigatory affidavit that the reason that he closed Trucking was that he could not hire enough drivers. There was no proof for this assertion, and it clearly appears to be untrue, because Yerger never advertised for drivers for Trucking. Instead, within a week of the start of the employees' union activities, from May 28 to June 3, Yerger ran an advertisement in the local newspaper for truck-drivers to be employed by Landscaping, at a time when Landscaping did not own or operate any trucks. Hotzman answered the advertisement; and, despite the fact that he had answered Landscaping's advertisement, he was given and filled out an application bearing Trucking's name, and he was hired by Trucking and paid by Trucking. Hermany, too, filled out Landscaping's application form, but was hired by Trucking. There was no proof submitted, and, especially in the absence of Respondent's brief, I find no reason that I can think of, why prospective drivers would have rather replied to Landscaping's advertisements rather than Trucking's. Finally, Trucking had 17 employees at the time that it allegedly went out of business. When Landscaping started in business, it had 17 employees. There was no shortage of drivers. I discredit this alleged reason in its entirety. Yerger merely concocted it, as he did much of his testimony.

Yerger also testified that the reason that he switched all his business from one firm to the other was that Trucking was having financial troubles, another assertion supported by not one iota of documentary evidence, such as tax returns or certified profit-and-loss statements. Rather, Yerger projected increased revenues, stated that his business would be profitable, and spoke of his "boom" months of April through June, hardly evidence of financial troubles. In any event, it was his alleged aim to reduce his obligations for workmen's compensation and unemployment insurance by tens of thousands of dollars. The way he did that was to avoid advising

the Commonwealth of Pennsylvania or his insurer that his company, now Landscaping, was the same as Trucking and was essentially a trucker, a business which was assessed at almost twice the rate as a landscaper. Instead, he advised that he was now in the landscaping and paving business, despite the facts that he was doing the same business on July 15 as he did on July 3, and that his gross income was about \$1.7 million, of which only \$6000 resulted from landscaping, and the remainder consisted of trucking proceeds.

Thus, if I were to believe Yerger, the change of the business entities, even if not motivated to avoid the Union, was accomplished to misstate the nature of Landscaping's business and defraud the Commonwealth and the insurer. However, I am convinced that Yerger's actual purpose was to defraud the Union and the Union's adherents by creating this fictional transfer. The "new business" of Landscaping was an obvious device intended to discourage Yerger's employees from ever engaging in union activity and to get rid of the "troublemakers." When Yerger announced the closing of Trucking, he knew that he was going to resume his trucking operations, and he never intended to go out of business. Just 2 days before he announced the closing of Trucking, on July 1, he entered into a 3-year agreement to haul from the Quarry. A week before, he met with his tire salesman and discussed his needs for new tires, with no sign that he was going out of business. In fact, the salesman thought that Trucking was still in business, a reaction which I find was utterly justified from all that he could observe. In mid-May Yerger reported to the USDA that the probability of Nolan's continued employment was good and that Nolan would continue to receive overtime, clearly an indication that Yerger planned to continue in business. Had it not been for the employees' attempt to organize, Trucking would still be the hauler of soil, not Landscaping. I conclude that the two entities are alter egos, and Yerger made use of Landscaping only to rid himself of the union supporters.

Yerger could not miss who the union supporters were. They were at the union meeting. They gathered after the election. They gathered at and after the meeting at which Yerger announced that he was closing Trucking. Yerger did not call these union supporters back to work when he reopened as Landscaping; but all the antiunion drivers returned. The layoff and then termination of the prounion drivers violated Section 8(a)(3) and (1) of the Act. Landscaping was obligated to offer reinstatement to them and failed to do so. Contrary to Respondents' defense that the discriminatees did not fill out applications for employment, Landscaping may not require Trucking's employees to file new job applications as a condition of employment. *Denzil S. Alkire*, 259 NLRB 1323, 1325 (1982), enf. denied on other grounds 716 F.2d 1014 (4th Cir. 1983).

In any event, Yerger did not require new applications from any of Trucking's employees. In response to a subpoena issued by the General Counsel, Respondents produced a list of the employees hired by Landscaping and the dates of their applications. Three were dated after Landscaping allegedly started its business, one was dated as early as April 1, 1990, and another was dated before June 1991, when, according to Yerger, he first prepared an application form for employment with Landscaping. Thus, some employees did not fill out Landscaping's applications before being employed by Landscaping. Yerger testified, however, that some of these dates

were wrong: the employees actually signed applications before they were hired by Landscaping but their applications had to be recopied on manilla files. When they were copied, they were again signed by the employees, who put on the dates they signed the new copies. The original applications were then destroyed.

I do not believe him. His answers were unintelligible poppycock. Yerger gave no cogent reason for recopying the applications after Landscaping started in business and throwing out the earlier applications. If that were necessary, there would have been no records reflecting older applications remaining in his files, and Yerger would not have been able to respond as he did to the General Counsel's subpoena. I find that there were no other applications and Yerger's story was made up to explain away the damaging evidence that he supplied. The applications were prepared on the dates shown in the record evidence, and the applications that were dated after Landscaping resumed business were prepared in an attempt to persuade me that applications were needed.

They were not. The antiunion drivers did not have to sign applications to retain their jobs with Landscaping. Yerger called Fox on July 9 and told him that he was going into business. Although Fox alleged that he then signed an application, it is apparent that Yerger encouraged him and the antiunion drivers to return and told some of them to sign applications even after they had already returned. Yerger apparently thought that Hermany was not in favor of the Union, and so Yerger merely asked him to return to work and did not require that he fill out an application. Those who were "troublemakers" were not asked to return or informed that he was resuming his operations. They were simply not contacted—in effect, terminated, with no prospect of reemployment, in violation of the Act.

The unfair labor practices found here, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

Some of the unfair labor practices found above were alleged by the Union as objections to the Board-conducted representation election. There is only one, the reassignment of the trucks, that was committed between the date of the filing for and the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). That constitutes conduct affecting the result of the election.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. From July 3 to 15 Yerger closed Trucking in order to discourage the employees from ever again involving themselves with any organizing effort. All the employees are entitled to be made whole for their losses during this period. In addition, the prounion employees were never rehired by Respondents, and they are entitled to be reinstated and made whole for all their losses from July 3 until they are reinstated. Accordingly, I shall order Respondents to offer immediate and full reinstatement to Donald DeCarr, Edward Nolan, Randall Frazer, Charles Riegel Jr., Steve Hermany, Scott Roboski, Keith Hotzman,

and Merlin Ulrich to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any newly hired, reassigned or transferred employees, and to make them and Edwin Beck Jr., Jay Seitzinger, Luther Engle Jr., Kenneth Spayd, John Fox, Solon Weidenhammer, Michael Hoch, Garth Wartenluft, Warren Ressler, and Linn Wartenluft whole for any loss of wages and other benefits they may have suffered by reason of Respondents' discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Included in my recommendation for reinstatement is Hermany, despite the fact that he has been offered reinstatement. Yerger telephoned Hermany on July 12 and offered him not only a job but told him that he would be driving truck 3701, which was air-conditioned and newer than the truck that he had been assigned to before. Hermany accepted; but he later talked with his friend, Hotzman, and found that Hotzman had not been offered a job. Yerger's offer to reinstate Hermany was made only after Yerger had said that he was going to get rid of the "troublemakers" and had told Hermany that whatever happened as a result of the closure of Trucking did not apply to him. Hermany turned down Yerger's offer because he was not going to continue to work for someone who violated the Act in this blatant manner. In these circumstances, Hermany had the right to fear that he would be treated in the same illegal manner if he returned to work and engaged in protected activities. Yerger's continuing misconduct served to undermine the validity of his offer to Hermany, who was not required to forgo his union activities in order to regain employment with Yerger.¹²

Certain employees missed work on June 3. The complaint alleges that only three—DeCarr, Roboski, and Ulrich—missed work; but the General Counsel claims that eight drivers were denied work. The only difficulty was that this was not fully litigated. To show that eight employees were denied work would require proof that Yerger engaged at least eight subcontracted trucks, which performed the work that the eight drivers were capable of performing. I concluded above that Yerger deliberately only used subcontracted trucks to do the jobs of his employees to discourage them from engaging in union activities. That ought to be remedied, but counsel for the parties stipulated that Trucking leased five or more trucks from independent contractors to work at the Quarry while five trucks from Trucking were not performing the work. The record supports the remedy, therefore, for only five employees. However, my finding that only five were discriminated against does not exclude the possibility that more drivers were denied work. In order to remedy the violation, I will recommend that all employees who were denied work by reason of Yerger's subcontracting trucks before putting Trucking's employees to work be made whole for their loss of 1 day's pay, together with interest as computed

¹² I reject the General Counsel's contention that Yerger's offer was invalid because it was made only 2 days before Hermany was to report to work. Hermany had the right to respond that he needed additional time to return to work, but he never claimed that Yerger's offer gave him insufficient time. *Esterline Electronics Corp.*, 290 NLRB 834 (1988).

above. The number of employees over five shall be determined in the compliance stage of this proceeding.

Regarding Nolan's application for a mortgage, I have concluded that Yerger spitefully sent information about the status of Nolan's driving license in order to punish him for his union support. Nolan appealed from USDA's denial of his mortgage, and his appeal was turned down on the sole ground that he had lost his employment, which I have concluded resulted from yet another of Respondents' unfair labor practices. The purpose of the remedies granted herein is to place the discriminatees in the position that they would have been in, had there been no violations. The General Counsel requests that Respondents should be ordered to write to the USDA enclosing the Board Decision and Order to explain that their letter to USDA on June 10 and discharge of Nolan were found to be in violation of the Act and informing the USDA that Nolan had been reinstated to his former position. He further requests that copies of this notification should be sent to Nolan and that Nolan should be reimbursed for the cost of filing a new mortgage application. The General Counsel was requested by me to submit to Respondents, a week before the briefs had to be filed, a proposed order and brief supporting any unusual remedy he sought, so that Respondents could reply in its principal brief. As noted above, Respondents filed no brief, and so I have no idea what their position is. I conclude that the requested remedy is fair in all respects, because it permits Nolan to file a new application, while employed, and permits him to clarify the status of his driver's license and his ability to obtain a "bread and butter" license. *Frostberg Village of Allegheny County Nursing Home*, 263 NLRB 651, 670 (1982).

Because of the serious nature of the unfair labor practices found here, the General Counsel seeks a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). I conclude that the following employees of Respondents constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time drivers and mechanics employed by Yerger Trucking, Inc. and Yerger Landscaping & Paving, Inc., Sinking Spring, Pennsylvania, excluding all clerical employees, guards, and supervisors as defined in the Act.

This is the unit stipulated by Trucking and the Union in the representation proceeding, with the exception of the addition of Landscaping because it is Trucking's alter ego. In addition, it is obvious that Respondents also constitute a single employer because of their common ownership, common management, centralized control of labor relations, and interrelation (indeed, identity) of operations. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

On May 21 Stoltz, Roboski, Ulrich, Riegel, Frazer, DeCarr, and Paine signed union cards. On May 22 Nolan, Engle, Hoch, and Seitzinger signed cards. That is a total of 11 employees, and there were 17 employed on that date. I find that the Union had a majority on May 22. I, therefore, conclude that at all times since May 22, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the above-mentioned unit for the purposes of collective bargaining with respect to rates

of pay, wages, hours of employment, and other terms and conditions of employment.

Gissel, supra, 395 U.S. at 613-614, permits the Board to order an employer to bargain with a union that has demonstrated majority strength prior to the commission of the unfair labor practices that the order is meant to remedy. An order is appropriate only in "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices'" and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." On learning that the employees were engaged in union activities, Yerger immediately threatened them with the closure of the facility and the resultant loss of their jobs. The threats were often repeated, the prounion employees were harassed, their right to use CB radios were taken away, they were deprived of 1 day's work, and finally Yerger closed Trucking, only to reopen under Landscaping's name without rehiring those who favored the Union. Yerger not only threatened retribution of the most basic kind but also carried out his threat. He laid off the entire complement of 17 employees and fired 8 of them, actions which cannot be easily forgotten by the employees who were not rehired as well as those who were, only after they were laid off 11 days.

Yerger's threat to close Trucking, a "hallmark violation" of the Act, is one of the most flagrant means by which he could have hoped to dissuade his employees from maintaining their union support. That alone was serious enough to justify the issuance of a bargaining order, particularly when accompanied by the subsequent closure of the facility. *Gissel*, supra, 396 at 616-620; *Precision Graphics*, 256 NLRB 381 (1981), enfd. mem. 681 F.2d 807 (3d Cir. 1982); *NLRB v. Atlas Microfilming*, 753 F.2d 313 (3d Cir. 1985). Here, Yerger carried out his threat, teaching a lesson to all by closing Trucking and showing Yerger's utter control over his employees' lives and welfare. Then, he reopened under Landscaping, but refused to permit the prounion employees from returning. In other words, he punished everyone because of the union activities, but only the prounion employees permanently. The discharges and layoffs are also hallmark violations of the Act which deserve to be remedied by a bargaining order. "[N]o event[s] can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Apple Tree Chevrolet*, 237 NLRB 867 (1978), modified 608 F.2d 988 (4th Cir. 1979). Thus, the possibility of conducting a fair election by the use of traditional remedies is slight. These employees would not forget what results from union activities. The employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by the issuance of a bargaining order rather than by traditional remedies alone. *Mayfield Produce Co.*, 290 NLRB 1083 fn. 3 (1988); *Kona 60 Minute Photo*, 277 NLRB 867, 870-871 (1985). It follows that, because of the serious nature of the unfair labor practices committed herein, I will also recommend a broad order requiring Respondents to cease and desist from infringing in any other manner on rights guaran-

teed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).¹³

Because I have recommended that a bargaining order issue, it also follows that, despite my findings of objectionable conduct, I will recommend that the Board-conducted representation election be set aside, that Case 4-RC-17637 be dismissed, and that all proceedings in connection therewith be vacated. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); *Trading Port, Inc.*, 219 NLRB 298 (1975).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondents, Yerger Trucking, Inc. and its alter ego, Yerger Landscaping & Paving, Inc., Sinking Spring, Pennsylvania, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening their employees with plant closure, sale of their business, loss of employment or benefits, changed terms and conditions of employment, violence, or any other reprisal because of their employees' support for Teamsters Local Union 429 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO or their participation in any other protected and concerted activities, including participation in Board processes.

(b) Threatening their employees with discharge, unless they withdraw an unfair labor practice charge filed with the Board's Regional Office.

(c) Interrogating their employees about their own and other employees' union activities and about their participation in Board processes.

(d) Spying on their employees' protected activities or creating the impression that their protected activities are under surveillance.

(e) Directing their employees to stop calling other employees at their homes and trying to get them to join the Union, or to stop passing out union cards on company property.

(f) Accusing their employees of disloyalty in order to discourage them from supporting the Union or engaging in union activities.

(g) Changing the terms and conditions of employment of their employees because of their union activities.

(h) Discharging, laying off, failing, or refusing to recall for employment, giving more onerous work assignments, failing to assign work, or otherwise discriminating against their employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

(i) Writing to mortgage lenders or other credit institutions in order to get revenge on their employees because they support or assist the Union.

(j) Giving more onerous work assignments to their employees because they support or assist the Union.

¹³There was no proof submitted to support the allegations contained in pars. 6(f)(1) and (k) and 8(a) and (b)(4). I will dismiss those allegations.

¹⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(k) Refusing to recognize or bargain collectively with the Union as the exclusive bargaining representative of all their employees in the unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment:

All full-time drivers and mechanics employed by Yerger Trucking, Inc. and Yerger Landscaping & Paving, Inc., Sinking Spring, Pennsylvania, excluding all clerical employees, guards, and supervisors as defined in the Act.

(l) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer their employees listed below immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any newly hired, reassigned, or transferred employees, and make the employees listed below whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision:

Donald DeCarr	Edward Nolan
Randall Frazer	Charles Riegel Jr.
Steve Hermany	Scott Roboski
Keith Hotzman	Merlin Ulrich

(b) Make whole their employees by paying them the wages lost by reason of Respondents' failure to assign them work on June 3, 1991, when Respondents subcontracted trucks, with drivers, from other companies, in the manner set forth in the remedy section of this decision.

(c) Make whole their employees listed below for losses they suffered as a result of Respondents' closure of their business after July 3, 1991, and until July 15, 1991, in the manner set forth in the remedy section of this decision:

Edwin Beck Jr.	Jay Seitzinger
Luther Engle Jr.	Kenneth L. Spayd
John Fox	Solon Weidenhammer
Michael Hoch	Garth Wartzenuft
Warren Ressler	Linn Wartzenuft

(d) On request, bargain with the Union as the exclusive representative of all their employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Rescind all discriminatory changes Respondents made in their employees' working conditions and maintain their original conditions of employment until the parties bargain in good faith to an agreement or bona fide impasse as to any proposed changes in such working conditions.

(f) Remove from their files any reference to the unlawful discharges of Donald DeCarr, Edward Nolan, Randall Frazer, Charles Riegel Jr., Steve Hermany, Scott Roboski, Keith Hotzman, and Merlin Ulrich and notify them in writing that

this has been done and that the discharges will not be used against them in any way.

(g) Submit a copy of the final Decision and Order in this proceeding to the United States Department of Agriculture, Farmers Home Administration, Leesport, Pennsylvania office and inform that institution in writing that Edward Nolan has been offered full reinstatement as their employee and is entitled to full backpay, with interest, pursuant to an Order of the National Labor Relations Board, and send a copy of that notification to Nolan.

(h) Reimburse Edward Nolan for the cost of filing a new mortgage application, should he wish to refile.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at their facility in Sinking Spring, Pennsylvania, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondents' authorized representative, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT threaten our employees with plant closure, sale of our business, loss of employment or benefits, changed terms and conditions of employment, violence, or any other reprisal because of our employees' support for Teamsters Local Union 429 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO or their participation in any other protected and concerted activities, including participation in Board processes.

WE WILL NOT threaten our employees with discharge, unless they withdraw an unfair labor practice charge filed with the Board's Regional Office.

WE WILL NOT interrogate our employees about their own and other employees' union activities and about their participation in Board processes.

WE WILL NOT spy on our employees' protected activities or create the impression that their protected activities are under surveillance.

WE WILL NOT direct our employees to stop calling other employees at their homes and trying to get them to join the Union, or to stop passing out union cards on company property.

WE WILL NOT accuse our employees of disloyalty in order to discourage them from supporting the Union or engaging in union activities.

WE WILL NOT change the terms and conditions of employment of our employees because of their union activities.

WE WILL NOT discharge, lay off, fail or refuse to recall for employment, give more onerous work assignments, fail to assign work, or otherwise discriminate against our employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

WE WILL NOT write to mortgage lenders or other credit institutions in order to get revenge on our employees because they support or assist the Union.

WE WILL NOT give more onerous work assignments to our employees because they support or assist the Union.

WE WILL NOT refuse to recognize or bargain collectively with the Union as the exclusive bargaining representative of all our employees in the unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment:

All full-time drivers and mechanics employed by Yerger Trucking, Inc. and Yerger Landscaping & Paving, Inc., Sinking Spring, Pennsylvania, excluding all clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer our employees listed below immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any newly hired, reassigned, or transferred employees, and make the employees listed below whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest:

Donald DeCarr	Edward Nolan
Randall Frazer	Charles Riegel Jr.
Steve Hermany	Scott Roboski
Keith Hotzman	Merlin Ulrich

WE WILL make whole our employees by paying them the wages lost by reason of our failure to assign them work on June 3, 1991, when we subcontracted trucks, with drivers, from other companies, with interest.

WE WILL make whole our employees listed below for losses they suffered as a result of our closure of our business after July 3, 1991, and until July 15, 1991, with interest:

Edwin Beck Jr.	Jay Seitzinger
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WE WILL, on request, bargain with the Union as the exclusive representative of all our employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL rescind all discriminatory changes we made in our employees' working conditions and maintain their original conditions of employment until the parties bargain in good faith to an agreement or bona fide impasse as to any proposed changes in such working conditions.

WE WILL remove from our files any reference to the unlawful discharges of Donald DeCarr, Edward Nolan, Randall Frazer, Charles Riegel Jr., Steve Hermany, Scott Roboski,

Keith Hotzman, and Merlin Ulrich and notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL submit a copy of the final Decision and Order in the proceeding of the National Labor Relations Board against us to the United States Department of Agriculture, Farmers Home Administration, Leesport, Pennsylvania office and inform that institution in writing that Edward Nolan has been offered full reinstatement as our employee and is entitled to full backpay, with interest, pursuant to an Order of the National Labor Relations Board, and send a copy of that notification to Nolan.

WE WILL reimburse Edward Nolan for the cost of filing a new mortgage application, should he wish to refile.

YERGER TRUCKING, INC. AND YERGER LAND-
SCAPING & PAVING, INC.